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03-155 MAY 13 2003

NO.

IN THE

Supreme Court of the United States

ALFRED W. TRENKLER,

Petitioner,

v.

MICHAEL PUGH, WARDEN, USP-ALLENWOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES L. SULTAN
Counsel of Record
CATHERINE J. HINTON
RANKIN & SULTAN
One Commercial Wharf North
Boston, Massachusetts 02110
(617) 720-0011

Dated: May 13, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether the Third Circuit's dismissal of petitioner's habeas petition for lack of jurisdiction must be reversed where: (1) petitioner sufficiently alleged that, due to the intervening Supreme Court decision in *Jones v. United States*, 529 U.S. 848 (2000), he was convicted based upon conduct that no longer falls within the ambit of 18 U.S.C. §§ 844(i) and 844(d); and (2) petitioner has met all the requirements to rely on the savings clause provision of 28 U.S.C. § 2255 to challenge the validity of his conviction pursuant to a petition under 28 U.S.C. § 2241.

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Alfred W. Trenkler hereby petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a final judgment in a habeas corpus case.

OPINION BELOW

On December 18, 2003, the United States Court of Appeals for the Third Circuit entered judgment affirming an order of the United States District Court for the Middle District of Pennsylvania denying Trenkler's habeas petition. A-10a.[1] The court's order stated:

> *Jones v. United States*, 529 U.S. 848 (2000)] does not decriminalize the conduct for which Trenkler was convicted. Thus the District Court properly held that there was not an intervening change in substantive law that entitled Trenkler to rely on the savings clause provision of 28 U.S.C. § 2255 to challenge the validity of his conviction pursuant to a petition under 28 U.S.C. § 2241. We therefore affirm the District Court's order denying Trenkler's habeas petition.

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Trenkler v. Pugh*, 83 Fed. Appx. 468, 2003WL22967268 (3rd Cir., Pa.), and appears in the Appendix at A-1a. On February 13, 2004, the court of appeals denied a petition for rehearing and petition for rehearing *en banc*. A-12a.

BASIS OF JURISDICTION

The opinion and judgment of the Court of Appeals was entered on December 18, 2003. A timely petition for rehearing was denied on February 13, 2004. This petition is filed within 90 days after denial of the petition for rehearing. This Court has jurisdiction to review final

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[1] The Appendix to this petition is cited as "A-__." Citations to the trial transcript are by volume and page number.

judgments of the courts of appeals in criminal cases pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Title 18 U.S.C. § 844(i) provides in relevant part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned. ...

Title 18 U.S.C. § 844(d) provides in relevant part:

> Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with knowledge and intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned. ...

Title 28 U.S.C. § 2255 provides in relevant part:

> ... An application for a writ of habeas corpus in [*sic*] behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. ...

STATEMENT OF THE CASE

On December 16, 1992, Alfred W. Trenkler ["Trenkler"] and Thomas Shay, Jr. ["Shay, Jr."] were indicted by a federal grand jury in the District of Massachusetts for attempted malicious destruction of property by means of explosive under 18 U.S.C. § 844(i), receipt of explosive materials under 18 U.S.C. § 844(d), and conspiracy under 18 U.S.C. § 371. The charges all arose from an explosion which occurred on October 28, 1991 at the Roslindale, Massachusetts home of Thomas Shay, Sr. ["Shay, Sr."] (the father of Shay, Jr.), which killed one Boston Police bomb squad officer and severely injured another. A superceding indictment was returned on June 24, 1993.

Trenkler filed a successful severance motion, and the government tried Trenkler and Shay, Jr. separately.[2] Trenkler went to trial before the Honorable Rya W. Zobel and a jury in November 1993. Trenkler's motion for judgment of acquittal at the close of the government's case and renewed motion for judgment of acquittal at the conclusion of all the evidence were denied. He was convicted on November 29, 1993 on all three counts of the superceding indictment. Trenkler filed a post-verdict motion for judgment of acquittal, which was denied on January 21, 1994.

On December 6, 1993, Trenkler filed a motion for new trial pursuant to Fed. R. Crim. P. 33, alleging various errors relating to the admission and exclusion of evidence by the district court. The district court denied the motion for new trial by marginal notation on January 21, 1994. On March 8, 1994, Trenkler was sentenced to

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[2] Shay, Jr. was tried first. He was convicted in the District of Massachusetts on July 27, 1993 of conspiracy and attempted malicious destruction of property, and was acquitted of receipt of explosive materials. He was sentenced to 188 months incarceration for malicious destruction of property and 60 months concurrent for conspiracy. His conviction was reversed on appeal. *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995). He subsequently pled guilty and was sentenced to 144 months incarceration and 60 months of supervised release.

concurrent terms of life imprisonment on the counts of attempted malicious destruction of property and receipt of explosive materials and a concurrent term of sixty months imprisonment on the count of conspiracy.

Following his conviction and sentencing, Trenkler timely appealed the judgment of conviction to the United States Court of Appeals for the First Circuit. His convictions were affirmed on direct appeal on July 18, 1995. *United States v. Trenkler*, 61 F.3d 45 (1st Cir. 1995).

On December 22, 1995, pursuant to Fed. R. Crim. P. 33, Trenkler filed a "Motion for New Trial or, in the Alternative, for an Evidentiary Hearing" on the grounds of newly-discovered evidence. On November 19, 1996, Trenkler filed a "Motion for Judicial Inquiry into Possible Juror Misconduct and For a New Trial" on grounds of juror misconduct. Both motions were denied. Trenkler appealed from these two denials in a consolidated appeal. The First Circuit affirmed the denials of both motions on January 6, 1998. *United States v. Trenkler*, 134 F.3d 361 (1st Cir. 1998).

On August 10, 2000, Trenkler filed an additional motion for new trial pursuant to Fed. R. Crim. P. 33 on grounds of newly-discovered evidence. The district court denied the motion on December 28, 2000. Trenkler filed a notice of appeal, but the appeal was dismissed on April 6, 2001. Trenkler filed a petition for writ of certiorari in the Supreme Court, which was denied on October 9, 2001. *United States v. Trenkler*, 122 S.Ct. 345 (2001).

On January 5, 1999, Trenkler filed a petition under 28 U.S.C. § 2255 on grounds of ineffective assistance of trial counsel. On April 18, 2000, the district court denied the petition. The First Circuit affirmed the denial of Trenkler's § 2255 petition on October 16, 2001. *United States v. Trenkler*, 268 F.3d 16 (1st Cir. 2001).

On October 3, 2002, Trenkler filed the instant petition under 28 U.S.C. § 2241 in the United States District Court for the Middle District of Pennsylvania[3] on

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[3] Trenkler is incarcerated at USP-Allenwood in Pennsylvania.

grounds that the conduct for which he was convicted no longer falls within the scope of 18 U.S.C. § 844(i) and § 844(d) in light of *Jones v. United States*, 529 U.S. 848 (2000), such that, under the "savings clause" of 28 U.S.C. § 2255, he is entitled to habeas relief pursuant to 28 U.S.C. § 2241. On March 7, 2003, the District Court (Conaboy, J.) dismissed Trenkler's petition on the ground of lack of jurisdiction. Trenkler filed a timely notice of appeal on March 18, 2003. The United States Court of Appeals for the Third Circuit entered its opinion and judgment affirming the District Court's dismissal of Trenkler's habeas petition on December 18, 2003. *Trenkler v. Pugh*, 83 Fed. Appx. 468, 2003WL22967268 (3rd Cir., Pa.). A timely petition for rehearing was denied by the Third Circuit on February 13, 2004.

STATEMENT OF RELEVANT FACTS

I. Overview of the Trial Evidence.

The government presented evidence that on October 27, 1991, the day before the explosion, Shay, Sr. heard a sound emanating beneath his 1986 Buick Century automobile as he drove over the crest of the driveway at his Roslindale, Massachusetts home. He then discovered a black box lying in his driveway. *Tr.* 6/69-79. On October 28, 1991, Shay, Sr. visited the Boston Police Department and reported his discovery. Police officers, including members of the bomb squad, Jeremiah Hurley and Frank Foley, responded to Shay, Sr.'s house to examine the box. *Tr.* 2/51, 61. The box exploded, killing Officer Hurley and seriously injuring Officer Foley. *Tr.* 3/17-18, 65.

Following the explosion, a massive investigation ensued. *Tr.* 5/74-78, 10/98-102. Shay, Sr. himself was the initial primary suspect. *Tr.* 8/42-49, 69, 11/29-30. The subsequent investigation culminated in the arrest of Shay, Jr. and Trenkler. At trial, Trenkler did not dispute Shay, Jr.'s guilt. *Tr.* 2/35. Trenkler argued instead that there was no evidence that **he** had anything to do with

the bomb and that the government's case rested purely on guilt by association and conjecture. *Tr.* 2/35.

The case against Trenkler at trial was extremely thin. The evidence was largely circumstantial, consisting primarily of Shay Jr.'s inculpatory statements about himself (*Tr.* 6/114-121, 8/67, 117-136, 9/38-44, 10/38-39), evidence that Trenkler and Shay, Jr. knew each other (*Tr.* 9/91, 149-157, 10/31-37, 93-94, 104) and evidence that Trenkler had built a different explosive device five years earlier.[4] The only direct evidence against Trenkler was his alleged inculpatory statements to a jailhouse informant, William Lindholm, under highly suspicious circumstances.[5]

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[4] The issue of whether the earlier device, which harmed no one, was similar to the device in this case was hotly contested by extensive expert testimony. The First Circuit later found that the results of a computer database presented by the government which purported to establish that the devices were similar should have been excluded as unreliable hearsay. However, the First Circuit ruled that the admission of this evidence was "harmless error" and affirmed Trenkler's conviction. *Trenkler*, 61 F.3d at 58-59.

[5] Lindholm was serving a federal sentence for marijuana and tax offenses at the time. He dismissed the appeal of his criminal case on December 15, 1992, the day before Trenkler's arrest. *Tr.* 13/79-82, 13/111. On December 17, the day after Trenkler's arrest, Lindholm was brought to the lockup at the Federal courthouse in Boston from the Hampshire County, Massachusetts jail on an allegedly "unrelated matter." At the end of the day, rather than being sent back to the county jail he had come from, Lindholm was transported instead to the Plymouth County jail, where Trenkler was being held. *Tr.* 13/82-83, 110. Lindholm testified that after he arrived in Plymouth, he and Trenkler engaged in small talk, and at some point Trenkler confessed: "I built the bomb." *Tr.* 13/82-87, 91-96. Trial counsel sought a voire dire hearing to determine whether statements allegedly made to Lindholm were made in violation of Trenkler's right to counsel, but the trial judge refused to allow further inquiry into the matter. At trial, Lindholm testified that he knew "the only way [his] sentence could be reduced [was] if [he] suppl[ied] new information to the government." *Tr.* 13/112. He testified that he had no agreement with the government and would not ask for any reward in the future. *Tr.* 13/124. One month after Trenkler's sentencing, however, Lindholm's attorney requested that the government file a

In his defense, Trenkler argued that he and Shay, Jr. were mere acquaintances, that the device he previously built was not at all similar to the Roslindale bomb, and that he never made any inculpatory statements. Trenkler has maintained throughout the proceedings in this case that he had nothing to do with the device that exploded in Shay, Sr.'s driveway and that he is an innocent man serving a term of life imprisonment for a crime he did not commit.

II. Facts Respecting the Vehicle for Purposes of 18 U.S.C. § 844(i).

18 U.S.C. § 844(i) authorizes conviction of "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce ...". The government's theory at trial was that Trenkler had attempted to damage or destroy Shay, Sr.'s 1986 Buick Century automobile, which was allegedly used in interstate commerce or in an activity affecting interstate commerce. Proving the interstate commercial character of the automobile was thus an essential part of the government's case.

Shay, Sr. testified that prior to October 1989, he had been employed full-time as an auto body worker for 20 years in Dedham and Allston, Massachusetts. *Tr.* 6/45. He went on permanent disability leave in October 1989 and began receiving Social Security disability payments. *Tr.* 6/44-45. When he left the Dedham garage in 1989, he sent out cards to his list of customers, asking them to call him at his Roslindale home. He continued to do some auto body repair work at a garage in West Roxbury, Massachusetts. Although he had a City of

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motion for reduction of sentence for Lindholm. The government did so, and on September 3, 1994, the Court reduced Lindolm's sentence to 42 months from the original 97 month sentence.

Boston business certificate permitting him to conduct business at the West Roxbury location until 1995, the evidence established that he subleased the West Roxbury garage for only three months following October 1989 and then closed it. *Tr.* 6/49, 55. During his permanent disability leave, aside from the three months he spent at the West Roxbury garage, he did some part time auto body work at the Rolling Wrench garage in South Boston, Massachusetts that was rented by his brother and also did some work in his own driveway at his Roslindale home. *Tr.* 6/47, 7/26. He testified that typically his customers came from the Boston area and surrounding towns, but he sometimes serviced customers from out of state. *Tr.* 6/53. He worked on both domestic and foreign cars. *Tr.* 6/54.

With respect to the specific vehicle at issue, Shay, Sr. testified that he bought the 1986 Buick Century vehicle in January 1986 and gave it away to a friend sometime during 1992. *Tr.* 6/51-52. During the years that he owned the 1986 Buick, he used the car to pick up parts that were manufactured throughout the country from various auto distributors. *Tr.* 6/53-54. He used the car to go to different insurance companies to do business. *Id.* He also allowed the 1986 Buick to be used as a loaner car "from time to time" while he was working on a customer's car. *Id.* Around October 12-13, 1991 (two weeks before the explosion), Shay, Sr. loaned the 1986 Buick to Lewis Rotman, whose car Shay, Sr. was working on. Shay, Sr. returned Mr. Rotman's car and retrieved his 1986 Buick on October 25, 1991 (three days before the explosion). Mr. Rotman lived in Randolph or Stoughton, Massachusetts. *Tr.* 6/56. There was no evidence presented that the 1986 Buick was necessary or integral to Shay, Sr.'s ability to do auto body work. Shay, Sr. also owned a 1983 General Motors van, which he had used to move equipment out of the West Roxbury garage in 1989. He also owned a 1969 Pontiac GTO. *Tr.* 6/55-56. Shay, Sr. lived with a woman named Mary Flanagan and sometimes used her 1989 Lincoln Town Car. *Tr.* 6/41, 59.

In instructing the jury as to the § 844(i) count, the trial judge stated:

> [T]he interstate element is ... [that] the car ... had to have been used in interstate commerce. The government has to show either that Shay, Sr., from time to time drove out of state on some business-related activity or that he used the car in the autobody [*sic*] business and that that is a business that affects interstate commerce. Any business, I can tell you, that uses materials manufactured in other states in a business affecting interstate commerce. ... The government doesn't have to prove that the defendant knew about the interstate commerce or that he intended to affect it. All it has to prove is that the car, in fact, was used in interstate commerce or in a business affecting it.

Tr. 17/123.

III. Facts Respecting the Receipt of Explosives for Purposes of 18 U.S.C. § 844(d).

18 U.S.C. § 844(d) authorizes conviction of "[w]hoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce, any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property ...". Proving the transportation or receipt of explosives in interstate or foreign commerce was thus an essential part of the government's case.

The government presented evidence through the testimony of Stephen Adams, an employee of Austin Powder Company, that the detonator found in the device which exploded on October 28, 1991 was an Austin "Rock Star" electric detonator made by his company. *Tr.* 4/2, 4/8-11. Austin Powder Company has been in

business since 1833. *Tr.* 4/2. Up to and through October 1991, Austin Powder's detonator caps were manufactured in Austria and snipped in component fashion for assembly in MacArthur, Ohio, and Brownsville, Texas. *Tr.* 4/5. After October 1991, the detonators were manufactured and assembled in Austria, then shipped to MacArthur, Ohio for distribution to Austin's storage facilities to distribute to customers. *Id.* Austin Powder Company has never had a manufacturing facility in Massachusetts. *Tr.* 4/11. Austin Powder has storage facilities and offices in Massachusetts, as well as in Vermont, Maine, and New Hampshire. *Tr.* 4/3. There was no evidence presented about how long the Austin Powder detonator had been in Massachusetts prior to its use in the device or about how or where or when Trenkler had allegedly obtained the Austin Powder detonator. *Tr.* 4/12.

In instructing the jury as to the § 844(d) charge, the trial judge stated:

> [T]he explosive must at some time have moved from one state to another. ... [The Government] doesn't have to prove that the defendant moved it. It doesn't even have to prove that he knew it came from another state. All it has to prove is that the explosive, either the dynamite or the detonator caps, had at one time been outside of Massachusetts and then came into the state. So, if you find that the explosive or one element of the explosive was manufactured outside of Massachusetts and was received or possessed within the Commonwealth, then this element is satisfied.

Tr. 17/121.

REASONS FOR GRANTING THE PETITION

Petitioner Alfred W. Trenkler ["Trenkler"] filed a petition for writ of habeas corpus asserting that he is being held in custody unlawfully because the conduct for which he was convicted no longer falls within the scope of 18 U.S.C. §§ 844(i) and 844(d). At the time of Trenkler's trial, settled law established that a *de minimis* connection between the defendant's acts and interstate commerce was sufficient to support a conviction under these statutes. Subsequent to Trenkler's trial, direct appeal, and motion to vacate under 28 U.S.C. § 2255, however, the Supreme Court decided *Jones v. United States*, 529 U.S. 848 (2000) ["*Jones*"). That decision significantly heightened the requirements for proving the interstate commerce element, thereby removing the conduct for which Trenkler was convicted from the ambit of §§ 844(i) and 844(d). Trenkler asserts that because the evidence at trial as to the interstate commerce element was insufficient to support his convictions, he remains imprisoned for an act which §§ 844(i) and 844(d) do not proscribe. His conviction under 18 U.S.C. § 371 for conspiracy to violate those statutes has been rendered invalid as well.

Trenkler cannot satisfy the gatekeeping provisions of § 2255 to challenge his unlawful conviction because the new *Jones* rule is one of statutory construction, rather than constitutional law. Accordingly, the remedy of a second and successive § 2255 motion is inadequate or ineffective to test the legality of his detention. Under the circumstances, Trenkler is entitled to seek relief pursuant to the "savings clause" of § 2255 by filing his petition under 28 U.S.C. § 2241. *See In re Dorsainvil*, 119 F.3d 245 (3rd Cir. 1997).

In the proceedings below, Trenkler demonstrated that he is entitled to substantive review on the merits under the "savings clause" because he has presented a meritorious claim that the conduct for which he was convicted no longer falls within the scope of 18 U.S.C. §§ 844(i) and 844(d) in light of *Jones*, a statutory decision

which is retroactive in application. Trenkler sufficiently alleged each of the prerequisites for relief under § 2241, including the "actual innocence" requirement. Since Trenkler properly pled a claim for relief under § 2241, he asserts that the district court **did** have jurisdiction to address the substantive merits of his claims and the petition must be reinstated for adjudication on the merits.

The Third Circuit made three erroneous rulings. First, the Third Circuit wrongly held that the *de minimis* trial evidence of Shay Sr.'s occasional use of his personal vehicle in connection with his sporadic, part-time auto body work was sufficient to meet the interstate commerce element of § 844(i). Second, the Third Circuit wrongly held that *de minimis* trial evidence that the explosive had crossed state lines by unknown means at some point in the unspecified past was sufficient to meet the interstate commerce element of § 844(d). Third, the Third Circuit erroneously held that § 2241 is not available as a procedural vehicle for litigating the substantive merits of Trenkler's claims, despite his having jumped through every one of the multiple hoops required for the proper use of that statute.

The decision of the Third Circuit is sharply in conflict with the clearly established law determined by this Court in *Jones* and as interpreted by other circuits. The Third Circuit's decision is impossible to square with *Jones*, with the Third Circuit's own decisions in *United States v. McGuire*, 178 F.3d 203 (3rd Cir. 1999) and *In re Dorsainvil*, 119 F.3d 245 (3rd Cir. 1997), or with the law of other circuits, including *United States v. Odom*, 252 F.3d 1289, 1295 (11th Cir. 2001), *United States v. Ryan*, 227 F.3d 1058, 1063-1064 (8th Cir. 2000), *United States v. Prevatte*, 300 F.3d 792, 802 (7th Cir. 2002), and *Martin v. Perez*, 319 F.3d 799, 804 (6th Cir. 2003). This Court should grant certiorari to resolve this intolerable conflict with its own law and within and among the circuits.

I. THE THIRD CIRCUIT'S DECISION THAT *JONES* DID NOT INVALIDATE TRENKLER'S SECTION 844(i) CONVICTION IS LEGALLY ERRONEOUS AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

Trenkler established that under *Jones* and its progeny, the trial evidence respecting Shay, Sr.'s 1986 Buick was insufficient to meet the interstate commerce element of § 844(i). However, the Third Circuit held that where a vehicle is ever used for any commercial purpose, that use is sufficient to meet the interstate commerce test, and there is no requirement as to "the degree to which a building's (or vehicle's) function must affect interstate commerce." (Third Circuit Decision, A-6a). The Third Circuit is wrong.

It is well-established that "[t]he mere engagement in commercial activities may not necessarily provide the requisite nexus between the function of the building [or vehicle] and interstate commerce." *United States v. Odom*, 252 F.3d 1289, 1295 (11th Cir. 2001). Rather, under *Jones*, the test is whether the building or vehicle was "**active[ly] employ[ed] for [interstate] commercial purposes**" and had more than a "**merely ... passive, passing, or past connection to commerce,**" *Jones*, 529 U.S. at 854-855 (emphasis supplied). A determination of whether a connection is "passive, passing, or past" is necessarily an inquiry into the "degree" of effect upon interstate commerce. In other words, notwithstanding the Third Circuit's rulings to the contrary, *Jones*, by its plain language, requires more than a *de minimis* connection between the property's use and interstate commerce. That standard was not met in this case.

The Third Circuit held that because Shay, Sr., sometimes used the Buick in connection with his part-time auto body repair business, and occasionally drove the Buick to stores to purchase parts, drove it to insurance offices, and loaned it to customers while he repaired their cars, the use of the Buick met the *Jones* standard. (Third Circuit Decision, A-6a-7a). The Third

Circuit is wrong. Viewing the interstate commerce test of *Jones* functionally, it is clear first that Shay Sr.'s personal vehicle was not used in the course of a commercial enterprise that was interstate in scope. In *United States v. McGuire*, 178 F.3d 203 (3rd Cir. 1999), the government made a nearly identical argument to the position embraced by the Third Circuit's decision here, claiming that a local catering business "by virtue of its existence as a for profit commercial enterprise, supplied by food items purchased at distributors, to include out of state suppliers, is by its nature a commercial enterprise which affects interstate commerce." *Id.* at 207. The court rejected that argument, concluding that the periodic use of a car in a "family business" that was "concededly local in character" and the presence in the trunk of a bottle of Florida orange juice intended for a catering event was not a sufficient basis for sustaining a § 844(i) conviction. *Id.* at 211-212. In sum, *McGuire* demonstrates that not all businesses are interstate in character.[6]

Here, as in *McGuire*, Shay Sr.'s "business" was decidedly local in character. Shay Sr. testified that typically his customers came from the Boston area and surrounding towns. At most, there was evidence that during the years between 1989 and 1991, Shay Sr. occasionally had customers from out of state; however, there was no evidence that he had any out-of-state customers at or near the time of the explosion. *Tr.* 6/53. The evidence established that the one customer he serviced shortly before the explosion lived in a nearby town. *Tr.* 6/56. A "past" connection to interstate commerce is not sufficient under *Jones*. *See United States v. Ryan*, 227 F.3d 1058, 1063-1064 (8th Cir.

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[6] While it is true that active involvement in the national rental market has been held to constitute an activity affecting interstate commerce *per se* (*see Russell v. United States*, 471 U.S. 858 (1985); *United States v. Williams*, 299 F.3d 250, 255-57 (3rd Cir. 2002)), the same cannot be said of other minimal commercial activities which are unrelated to the rental market, as demonstrated by *McGuire*, 178 F.3d at 211.

2000)(a building which was formerly a fitness center was insufficiently commercial because evidence of past commercial use did not render the property presently commercial).

Second, it cannot reasonably be said that Shay Sr.'s sporadic performance of auto body repair work in his driveway constituted commercial activity "affecting" interstate commerce. In contrast to the government's attempts to portray Shay Sr.'s work as "an ongoing auto body repair business," Shay Sr. himself described the work as far more sporadic: "[S]ometimes I'll do some auto body work periodically." *Tr.* 6/44. There was no evidence that at the time of the explosion Shay Sr. had any significant income from his casual, part-time auto body work, had any employees, or was incorporated as a business.

In *United States v. Jimenez*, 256 F.3d 330, 339 (5th Cir. 2001), the court found that a victim's home, which contained a home office that was the primary location for the victim's family-owned construction business with gross receipts averaging nearly $20,000 per month and paying over $8,000 per month in wages, was used in an activity affecting interstate commerce. In so holding, the *Jimenez* court specifically distinguished *United States v. Denalli*, 73 F.3d 328, 321 (11th Cir. 1996), a case involving someone who "occasionally works from home" using a personal computer. 256 F.3d at 339. Here, Shay Sr. "sometimes" and "periodically" worked from home; he also worked part-time at his brother's Rolling Wrench garage in South Boston. *Tr.* 6/47, 7/26. The exceedingly marginal nature of Shay Sr.'s auto body work was demonstrated by his permanent disability status and his receipt of Social Security disability payments at the time. Indeed, Shay Sr. specifically agreed at trial that the $600 per month he received in Social Security benefits was the main income he relied upon in 1991. *Tr.* 7/14.

Third, there was insufficient evidence that the 1986 Buick was "actively used" in connection with any interstate commercial enterprise, even assuming such an

enterprise existed. Contrary to the Third Circuit's characterization (Third Circuit Decision, A-7a, in *McGuire*, 178 F.3d at 208, the presence of the bottle of orange juice was not the only factor the Third Circuit considered. Rather, in *McGuire*, the court concluded that the "periodic" use of one personal car among several in a local catering business together with the presence of a bottle of out-of-state orange juice could not be a sufficient basis for sustaining a § 844(i) conviction, noting: "[W]e consider both the nature and frequency of that use [of the car], **as well as the extent to which the catering activity affected commerce**, in deciding if the evidence supports the exercise of federal jurisdiction." *Id.* at 208 (emphasis added). The court observed: "[t]his was not a situation where the Toyota was necessary to the catering operation." *Id.* at 211, n.8. Here, as in *McGuire*, the government's evidence established only the occasional use of one personal car among several cars that might have been used in a local business.[7] Indeed, the evidence established that Shay, Sr. was able to conduct his affairs without the use of the Buick for several weeks at a time. *Tr.* 6/57.

In contrast to the government's efforts below to portray Shay Sr.'s use of the car as "significant, integral, on-going use" for commercial purposes, there was no evidence presented in this case that the use of Shay Sr.'s personal vehicle in connection with his part-time auto body work was anything more than casual and intermittent. The trial evidence established that Shay, Sr. used his personal car on a daily basis to run personal errands, drive to social events, pick up take-out food, visit family members in the hospital, and the like. *Tr.* 6/60-63, 67. His use of the car along the way to pick up parts in-state which were made out-of-state or to travel

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[7] In addition to the 1986 Buick, Shay Sr. owned a 1983 General Motors van and a 1969 Pontiac GTO, sometimes used a 1989 Lincoln Town Car owned by the woman he lived with, and at some unknown time (at least as of 1992 but perhaps earlier) "had another vehicle." Tr. 6/41, 53, 55-56, 59.

to in-state insurance companies did not transform the car's use to interstate commercial use, any more than the use of the car in *McGuire* to transport out-of-state orange juice for purposes of a catering business constituted use in interstate commerce. In-state purchase of materials which have traveled from out-of-state constitutes a passive use which has routinely been held insufficient, as in *Odom*, 252 F.3d at 1296-97; *United States v. Rea*, 223 F.3d 741, 743 (8th Cir. 2000); *United States v. Johnson*, 246 F.3d 749, 750 (5th Cir. 2001).[8]

Finally, there was no evidence that the vehicle was part of the national rental market for vehicles, as in *United States v. Geiger*, 263 F.3d 1034, 1036-1037 (9th Cir. 2001), or *United States v. Beeler*, 2001 WL 832357, *6 (D.Me.). Shay, Sr.'s occasional use of the car as a "loaner vehicle" while he was fixing customers' cars was clearly an informal and impromptu arrangement that was not the primary use of his personal vehicle. Such an informal swapping arrangement is not sufficient to satisfy the requirements of the interstate commerce element. *See United States v. Carr II*, 202 F. Supp. 2d 467 (E.D.N.C. 2002) (owner-occupied mobile home, serving primarily as a residence and secondarily as a church, with some isolated child care activities taking place therein, does not qualify as a property used in interstate commerce, despite "informal and insubstantial" bill-sharing arrangements); *Martin v. Perez*, 319 F.3d 799, 804 (6th Cir. 2003) (to constitute participation in rental market under *Jones* test, house

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[8] These cases cannot be distinguished on the grounds that they involve churches. A property generally thought of as non-commercial, such as a church, may meet the standard sufficiently to be deemed used in interstate commerce. *See, e.g., United States v. Terry*, 257 F.3d 366 (4th Cir. 2001) (church used as daycare center). Likewise, a property generally thought of as commercial may not meet the standard sufficiently to be deemed used in interstate commerce. *See, e.g., Ryan*, 227 F.3d at 1061 (inactive fitness center); *McGuire*, 178 F.3d at 207 (personal car periodically used in connection with local catering business).

must be "actually rented ... through an arm's length transaction;" not merely have someone other than the owner living in it).

In sum, Shay Sr.'s automobile served primarily as a personal vehicle, was used only secondarily in connection with his sporadic and intermittent part-time, local work, and was never formally "rented" to anyone. Accordingly, it did not constitute a vehicle actively used in interstate commerce under *Jones*. Trenkler has demonstrated a non-frivolous claim that, following *Jones*, the evidence at trial was insufficient to prove that he violated or conspired to violate § 844(i). The Third Circuit's decision to the contrary is both erroneous and in conflict with the law of several other circuits.

II. THE THIRD CIRCUIT'S DECISION THAT *JONES* DID NOT INVALIDATE TRENKLER'S SECTION 844(d) CONVICTION IS LEGALLY ERRONEOUS AND CONFLICTS WITH DECISIONS OF THIS COURT.

The Third Circuit's decision respecting Trenkler's § 844(d) conviction is also faulty. The Third Circuit failed to address Trenkler's argument that the broader principles of *Jones* apply to the interpretation of § 844(d), and rejected Trenkler's claim based upon its restatement of only the narrowest holding of *Jones*, respecting whether a building (or vehicle) was actively "used" in interstate commerce. (Third Circuit Decision, A-7a-8a). However, Jones stands for a broader legal principle, namely that "it is appropriate to avoid the constitutional question" raised by *United States v. Lopez*, 514 U.S. 549 (1995), by construing statutes which raise Commerce Clause issues narrowly to avoid encroaching on the authority of the states by rendering "traditionally local conduct ... a matter for federal enforcement." *Jones*, 529 U.S. at 858. That broader holding of *Jones* is clearly implicated in this case. This Court should address the application of that principle to § 844(d).

Section 844(d) punishes whoever "transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive ..." The phrase "affecting commerce" does not appear within § 844(d). The presence or absence of the term "affecting commerce" has enormous significance in Commerce Clause jurisprudence. The Supreme Court in *Jones* pointed out the "recognized distinction between legislation limited to activities 'in commerce' and legislation invoking Congress' full power over activity substantially 'affecting ... commerce.'" 529 U.S. at 856. *See, e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964)("affect[ing] commerce" statutory language shows congressional intent to reach as far as the Commerce Clause permits). Since § 844(d) does not use the phrase "affecting commerce," there was no intent by Congress to exercise its fullest Commerce Clause power with respect to § 844(d). Accordingly, § 844(d)'s elements must be more narrowly defined.

The statutory elements of § 844(d), prohibiting receipt of explosives "in commerce," cannot be satisfied by mere proof of the movement of explosives at some time in the past.[9] The phrase "in commerce" denotes "only persons

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[9] It should be noted that 18 U.S.C. § 844(d) (which lacks the phrase "affecting commerce") is vastly dissimilar to 18 U.S.C. § 922(g). Section 922(g) renders it illegal for a felon to "ship or transport in interstate or foreign commerce, or possess *in or affecting* commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." (emphasis supplied). In *Scarborough v. United States*, 431 U.S. 563, 568 (1977), the Supreme Court held, purely as a matter of statutory construction based on the "affecting commerce" language, which signaled an assertion of Congress' full Commerce Clause power, that in order to convict a defendant for being a felon in possession of a firearm under the similar predecessor statute, 18 U.S.C. § 1202(a), the government only had to prove that "the firearm possessed by the convicted felon traveled at some time in interstate commerce." 431 U.S. at 571-574. *See also United States v. Singletary*, 268 F.3d 196 (3rd Cir. 2001)(Section 922(g) "regulates those weapons *affecting commerce* by being the subject of interstate trade." (emphasis added)). In contrast, in this case, whether or not

or activities within the flow of interstate commerce--the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *United States v. American Bldg. Maint. Indus.*, 422 U.S. 271, 276-280 (1975). A party is "in commerce" when it is "directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce." *United States v. Robertson*, 514 U.S. 669, 671 (1995). Under this more restrictive definition, the mere purchase from a local supplier of goods which at one time traveled in interstate commerce does not constitute engaging "in commerce." *See American Bldg. Maint. Indus.*, 422 U.S. at 280 (company did not engage "in commerce" based on local purchases of supplies manufactured out-of-state where "the flow of commerce had ceased"); *Robertson*, 514 U.S. at 671 (Alaskan gold mine that directly purchased equipment from out-of-state supplier was engaged "in commerce," contrasted with a company that purchased goods from local suppliers).

In this case, the only pertinent evidence on this essential element was that the explosives had, at some unknown time in the past, been shipped in interstate commerce. There was no evidence that Trenkler had played any role in that interstate shipment. Based upon the evidence as presented at trial, "the flow of commerce [may well have] ceased," *American Bldg. Maint. Indus.*, 422 U.S. at 280, and the explosives may well have been stored in Massachusetts for many years before Trenkler ever allegedly possessed them. Accordingly, the evidence

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an explosive "affected" interstate commerce is both insufficient and irrelevant under § 844(d), which instead proscribes the direct transportation or receipt of explosives by the defendant "in ... commerce." Trenkler does not argue that the government was required to prove that the explosives "affected" interstate commerce to prove a violation of § 844(d). Rather, Trenkler argues that there was insufficient evidence that he, Trenkler, had anything directly to do with transporting or receiving the explosives "in commerce," which is an entirely different question.

at trial was clearly insufficient to establish that Trenkler transported or received explosives "in commerce."

As set forth above, the broader holding of Jones was that "it is appropriate to avoid the constitutional question" raised by *Lopez* by construing statutes which raise Commerce Clause issues narrowly. *Jones*, 529 U.S. at 858. An interpretation of § 844(d) by which mere interstate transportation of an explosive at any time in the past is sufficient would be "constitutionally doubtful" and must be avoided pursuant to *Jones'* broader holding. Evidence directly linking the defendant to the movement of the explosives "in commerce" is required, but was utterly lacking here. Accordingly, Trenkler has presented a non-frivolous claim of actual innocence on the ground that the evidence was insufficient to prove he violated or conspired to violate § 844(d). The Third Circuit's ruling to the contrary is erroneous and conflicts with decisions of this Court.

III. THE THIRD CIRCUIT'S DECISION MISAPPREHENDS THE AVAILABILITY OF 28 U.S.C. § 2241 FOR LITIGATING THE SUBSTANTIVE MERITS OF TRENKLER'S CLAIMS AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

A. Summary of Applicable Law.

Once a petitioner has filed a petition under 28 U.S.C. § 2255, his opportunities to file a second such petition are drastically limited. Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a second or successive § 2255 motion must contain either:

> (1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

> (2) a new rule of **constitutional** law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255 (emphasis added). A narrow exception to this rule is found in the "savings clause," which states:

> An application for a writ of habeas corpus in [*sic*] behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, **unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.**

28 U.S.C. § 2255 ["savings clause"] (emphasis added).

The savings clause has been limited to extraordinary circumstances. It is not applicable simply because a petitioner is unable to meet the gatekeeping requirements of § 2255 in the ordinary course. However, the limitations imposed by AEDPA on second or successive petitions have created a new circumstance under which the remedy afforded by § 2255 is deemed "inadequate or ineffective." Because a second or successive § 2255 motion may only be filed based upon either newly-discovered evidence or a new rule of **constitutional** law, such a petition is not permitted when the Supreme Court reinterprets the meaning of the statute under which the defendant has been convicted. The savings clause may apply to these statutory claims under certain circumstances. *See Sustache-Rivera v. United States*, 221 F.3d 8, 16 (1st Cir. 2000) ("The savings clause has to be resorted to for ... statutory claim[s] because Congress restricted second or successive petitions to constitutional claims.").

A number of courts have deemed § 2255 to be inadequate or ineffective pursuant to the savings clause and have permitted defendants to challenge their underlying convictions through *habeas* petitions filed pursuant to 28 U.S.C. § 2241. This has occurred in numerous cases involving the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), in which the Court held that the term "use" had been interpreted too expansively in lower court applications of 18 U.S.C. § 924(c). *See, e.g., Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001); *In re Jones*, 226 F.3d 328 (4th Cir. 2000); *In re Davenport*, 147 F.3d 605 (7th Cir. 1998); *Triestman v. United States*, 124 F.3d 361 (2nd Cir. 1997); *In re Dorsainvil*, 119 F.3d 245 (3rd Cir. 1997). Claims made under 28 U.S.C. § 2241 were permitted in these cases because the change in the law in *Bailey* was statutory as opposed to constitutional and because *Bailey* rendered certain conduct no longer criminal for which petitioners would otherwise remain in prison.

In *Dorsainvil*, 119 F.3d at 248-251, the Third Circuit considered the case of a petitioner who was convicted of using a firearm during a drug trafficking crime, but asserted that his conviction was rendered invalid by the Supreme Court's decision in *Bailey*. The Third Circuit held that the § 2255 remedy was inadequate or ineffective because *Bailey* set forth a new statutory rule and was decided after the petitioner had filed his first § 2255 motion. The court recognized that it would be a miscarriage of justice to punish a defendant for an act which the law no longer criminalizes, citing *Davis v. United States*, 417 U.S. 333, 346 (1974). Therefore, the court concluded, it would also be a miscarriage of justice for the AEDPA amendment to § 2255 to make collateral relief unavailable under such circumstances. *Dorsainvil*, 119 F.3d at 251. "[W]e conclude that, under narrow circumstances, a petitioner in Dorsainvil's uncommon situation may resort to the writ of habeas corpus codified under 28 U.S.C. § 2241." *Id.* at 248.

In *Jones*, 226 F.3d at 333, the Fourth Circuit explicated a three prong test as to when § 2255 is

inadequate and ineffective and a savings clause claim may be made pursuant to § 2241: "[W]hen (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law." *Id.* at 333.

Because the savings clause vehicle is limited to exceptional cases, it can only be invoked by petitioners claiming that an intervening change in substantive law has placed their conduct outside the ambit of the statute they were convicted of violating. *See, e.g., Davenport*, 147 F.3d at 611 ("so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense); *Dorsainvil*, 119 F.3d at 251 ("prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate"); *Sustache-Rivera*, 221 F.3d at 16 ("The savings clause has most often been used as a vehicle to present an argument that, under a Supreme Court decision overruling the circuit courts as to the meaning of a statute, a prisoner is not guilty within the new meaning attributed to the statute"). Of course, the decision upon which the petitioner is relying must be retroactively applicable on collateral review. *See Dorsainvil*, 119 F.3d at 251 ("government concedes that such a change should be applied retroactively"); *Reyes-Requena*, 243 F.3d at 904 (savings clause "applies to a claim ... based on retroactively applicable Supreme Court decision").

C. Application of Law to Facts.

In this case, the Third Circuit ruled on procedural grounds that: "Because *Jones* does not decriminalize the conduct at issue in this case, we affirm the District Court's denial of Trenkler's 2241 petition for lack of jurisdiction." (Third Circuit Decision, A-2a). However,

this is nothing more than a position on the merits masquerading as a jurisdictional holding. Of course, the court may not first decide the merits of a claim in order to determine whether it has proper jurisdiction over it. Rather the court has jurisdiction to resolve the substantive claim if the petitioner has sufficiently alleged each of the requirements of the savings clause such that a possibility of relief exists under § 2241. *See Dorsainvil*, 119 F.3d at 252 (where petitioner presented "colorable claim" that the intervening Supreme Court decision had rendered his conduct non-criminal for purposes of 18 U.S.C. § 924(c), he was entitled to substantive review on the merits by the district court under § 2241); *Martin*, 319 F.3d at 806 (where petitioner stated a "not ... frivolous" claim satisfying the requirements of § 2241 that *Jones* invalidated his § 844(i) conviction, he was entitled to a hearing on the merits); *Prevatte*, 300 F.3d at 802 (where petitioner presented "non-frivolous challenge" that due to the intervening Supreme Court decision in *Jones*, he was convicted for conduct that Congress did not intend to make criminal under § 844(i), substantive review on the merits by the district court under § 2241 was appropriate). Here, as in *Dorsainvil*, *Martin*, and *Prevatte*, Trenkler has properly alleged all of the bases for a claim under § 2241, and the district court had jurisdiction to hear the substantive merits of his claims, as set forth in detail below.

1. The substantive criminal law has been changed by the Supreme Court.

At the time of Trenkler's trial, direct appeal, and first § 2255 motion, the *de minimis* standard for proving the interstate commerce elements of both § 844(i) and § 844(d) was settled law. At that time, a violation of § 844(i) could be proven by mere evidence of a passive, passing, or past connection between the property destroyed and interstate commerce. *See, e.g., United States v. DiSanto*, 86 F.3d 1238, 1248 (1st Cir. 1996)

("[T]he government need only show, and the jury need only find, a *de minimis* connection to interstate commerce in order to sustain a conviction under 18 U.S.C. § 844(i)."). Likewise, prior to Jones, a court might well have concluded, by analogy to *Scarborough v. United States*, 431 U.S. 563, 568 (1977), that a violation of § 844(d) could be proven by mere evidence that the explosives had traveled across state lines at any point in time.

Subsequently, as set forth in detail in parts I and II above, after this Court's decision in *Jones*, the substantive law changed significantly respecting the interstate commerce elements the government must meet to prove these substantive offenses. Under § 844(i), the government must now present sufficient evidence to prove that the property was actively employed for commercial purposes in more than a merely passive, passing, or past manner. Likewise, under § 844(d), mere proof that explosives were at some point manufactured out-of-state can no longer be sufficient to support conviction.

2. The new law is statutory, rather than constitutional.

Trenkler could not satisfy the gatekeeping provisions for filing a second § 2255 motion under AEDPA because the new *Jones* rule is not one of constitutional law, but rather one of statutory construction. Instead of invalidating § 844(i) as unconstitutional, the Court in *Jones* announced a new statutory interpretation adopted for the purpose of avoiding constitutional problems. *Id.* at 858-859. *See also Prevatte*, 300 F.3d at 798 ("the *Jones* decision is a 'change that eludes the permission in section 2255 for successive motions,' ... because, like *Bailey*, it involves statutory, not constitutional, interpretation"); *Martin*, 319 F.3d at 805 (same); *Ryan*, 227 F.3d at 1062 (*Jones* involved interpretation of the substantive reach of a federal statute).

3. The new law is retroactively applicable.

The holding of *Jones* is retroactively applicable. As the Supreme Court noted in its decision in *Bousley v. United States*, 523 U.S. 614 (1998), the holding of *Teague v. Lane*, 489 U.S. 288 (1989) that the Supreme Court itself declare its precedent retroactively applicable to collateral review does not apply to new rules regarding substantive criminal rights, as opposed to procedural rights. *Id.* at 620. The Court therefore held that its decision in *Bailey* was retroactively applicable to cases on collateral review. *Id.* The Eighth Circuit has deemed *Jones* to be retroactively applicable on the grounds that it establishes a substantive right akin to that recognized in *Bailey*: "*Teague* does not apply in those cases in which the Court determines the meaning of a criminal statute enacted by Congress, because such a decision involves the substantive reach of a federal statute, not a new rule of criminal procedure. ... Thus, *Jones* may be applied retroactively." *Ryan*, 227 F.3d at 1062 (emphasis supplied). *See also Prevatte*, 300 F.3d at 802 (*Jones* is automatically retroactively applicable).

4. Petitioner asserts a claim of actual innocence.

As the Supreme Court stated in *Bousley*, 523 U.S. at 623: "To establish actual innocence, petitioner must demonstrate that, in light of all of the evidence, it is more likely than not that no reasonable juror would have convicted him," *citing Schlup v. Delo*, 513 U.S. 298, 327-328 (1995) (internal citations omitted). A claim that the evidence presented at trial was insufficient to meet the interstate commerce element of a federal crime in light of a retroactively applicable substantive redefinition of that element by the Supreme Court certainly states an "actual innocence" claim sufficient to permit a petitioner to proceed under § 2241. *See Reyes-Requena*, 243 F.3d at 904 (where facts presented at trial would not be

sufficient to sustain a conviction of 18 U.S.C. § 924(c)(1) in light of changed definition of "use" set forth in *Bailey*, petitioner met "actual innocence" prong of savings clause test); *In re Jones*, 226 F.3d at 334 ("the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal"); *Davenport*, 147 F.3d at 610 (prisoner's *Bailey* claim constituted a "claim that he is indeed being held in prison for a nonexistent crime").[10] Petitioner has presented a valid claim that under the *Jones* standard, no reasonable factfinder could find beyond a reasonable doubt that the interstate commerce element of either 844(i) or 844(d) was met by the government's evidence.

Several courts have dealt with this issue in the § 2241 context. In *Martin*, 319 F.3d 799, the Sixth Circuit reversed a district court's dismissal of a § 2241 habeas petition, holding that where the petitioner claimed in light of *Jones* that he could not be guilty of federal bombing statute because he bombed a private residence, the petitioner met the "actual innocence" prong of the savings clause test and was entitled to a hearing on the merits. Similarly, in *Prevatte*, 300 F.3d at 802, where petitioner claimed that the *Jones* decision rendered him actually innocent of violating § 844(i) because the evidence of the interstate commerce element was

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[10] It was only in the specific context of determining whether there was a sufficient factual basis to uphold a guilty plea, rather than determining the sufficiency of the trial evidence, that the Supreme Court in *Bousley* Court noted: "in this regard ... 'actual innocence' means factual innocence, not mere legal insufficiency. ... In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. ... Further, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered before our decision in *Bailey*." 523 U.S. at 623-24. *See, e.g., Martin*, 319 F.3d at 801-804 (where petitioner sought to vacate a guilty plea for an insufficient factual basis under § 844(i) after *Jones*, an evidentiary hearing was required to expand the evidence beyond the plea colloquy stipulation as to whether bombed house was rental property or not). This case does not involve a guilty plea.

insufficient, the Seventh Circuit found that the defendant's claim was sufficiently meritorious under § 2241 to warrant transfer to the district of confinement with jurisdiction over the claim. *Id.* In *Ryan*, 227 F.3d at 1062, the Eighth Circuit, addressing a similar claim on a first § 2255 motion, held: "[W]e conclude that there is insufficient evidence to satisfy the interstate commerce requirement of section 844(i), an essential element of this statute. Thus because Ryan stands convicted for conduct not prohibited by section 844(i), we must reverse the judgment."

The alleged attempted bombing of a personal vehicle with merely a passive, passing, or past connection to interstate commerce, by means of explosives which may well have been purchased from local suppliers long after their movement in interstate commerce ceased, constitutes "traditionally local criminal conduct" within the jurisdiction of state authorities, rather than federal criminal conduct subject to the reach of federal criminal law. To read §§ 844(i) and 844(d) as encompassing such alleged conduct would significantly alter the federal-state balance of power by inappropriately escalating federal authority over "paradigmatic common-law state crime[s]." *Jones*, 529 U.S. at 858. Under *Jones*, these statutes are to be construed narrowly to avoid such a constitutionally dubious interpretation.

Under the properly narrow statutory construction required by *Jones*, Trenkler presented a cognizable claim that the evidence at trial was insufficient to support his conviction under §§ 844(i), 844(d), and 371. That claim met all of the requirements for relief under § 2241. Trenkler articulated a claim of actual innocence of the federal offenses for which he was convicted under a new, retroactively applicable, Supreme Court statutory ruling which was issued after his direct appeal and first § 2255 motion were decided. If Trenkler stands convicted for conduct which the substantive federal criminal law does not proscribe, such a result is "a complete miscarriage of justice and present[s] exceptional circumstances that justify collateral relief under § 2255." *Dorsainvil*, 119

F.3d at 250. Accordingly, Trenkler's petition cannot be dismissed for lack of jurisdiction.

CONCLUSION

Trenkler has presented a cognizable and non-frivolous claim that the *Jones* decision significantly heightened the requirements for proving the interstate commerce element, thereby removing his alleged conduct from the ambit of §§ 844(i) and 844(d). Trenkler has sufficiently alleged that, because the evidence at trial was insufficient to support his convictions, he remains imprisoned for alleged "traditionally local criminal conduct" which the substantive federal criminal law does not prohibit. Trenkler's petition under § 2241 provides the appropriate means for his claims to be heard, and there is no procedural or jurisdictional obstacle to the district court's resolution of both of his claims on their merits. Trenkler's petition for habeas corpus was erroneously dismissed for lack of jurisdiction, in a manner which conflicts with the law of this Court, the Third Circuit's own precedent, and decisions of several other circuits.

For the foregoing reasons, this Court should grant the petitioner's application for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,
ALFRED W. TRENKLER
By his attorneys,

JAMES L. SULTAN
Counsel of Record
CATHERINE J. HINTON
RANKIN & SULTAN
One Commercial Wharf North
Boston, MA 02110
(617) 720-0011

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1775

ALFRED W. TRENKLER,

Appellant

v.

MICHAEL PUGH, Warden

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 02-cv-01736)
District Judge: Honorable Richard P. Conaboy

Submitted Under Third Circuit LAR 34.1(a)
December 12, 2003

Before: AMBRO, FUENTES and GARTH, Circuit Judges

(Opinion filed: December 18, 2003)

OPINION

AMBRO, Circuit Judge

Petitioner Alfred W. Trenkler is serving concurrent life sentences in the United States Penitentiary at Allenwood for convictions under the federal arson statute and other statutes. He petitioned the United States District Court for the Middle District of Pennsylvania for relief from this sentence under 28 U.S.C. § 2241, arguing that, in light of the Supreme Court's decision in *Jones v. United States*, 529 U.S. 848 (2000), the conduct for which he was convicted is no longer criminal. Because *Jones v. United States* does not decriminalize the conduct at issue in this case, we affirm the District Court's denial of Trenkler's § 2241 petition for lack of jurisdiction.

I.

Facts and Procedural Posture

In October 1991, an explosion at the Roslindale, Massachusetts home of Thomas Shay, Sr. killed one Boston Police Bomb Squad Officer and severely maimed another. The police officers had been investigating a suspicious object in Shay Sr.'s driveway which he reported finding after hearing noises coming from the floorboards of his 1986 Buick Century. Police later arrested two suspects Trenkler and Thomas Shay, Jr., for their respective roles in the explosion. The two men were indicted by a grand jury and tried separately. At Trenkler's trial, the government's case was that Trenkler had built the bomb for Shay Jr. to use against his father. *See United States v. Trenkler*, 61 F.3d 45, 48 (1st Cir. 1995). In 1994, Trenkler was convicted of conspiracy in violation of 18 U.S.C. § 371; receipt of explosive materials in interstate commerce with the intent to kill, injure, and intimidate Shay Sr. and cause damage to his property, in violation of 18 U.S.C. § 844(d); and attempting to damage and destroy maliciously, by means of an explosive, Shay Sr.'s car, which was used

in interstate commerce, in violation of 18 U.S.C. § 844(i). Trenkler was sentenced to two concurrent terms of life imprisonment for the § 844 convictions and one concurrent sixty month term for the conspiracy conviction. (Shay Jr., in contrast, received a 12 year sentence following a plea agreement.)

Since the Court of Appeals for the First Circuit affirmed Trenkler's sentence on direct appeal in 1995, Trenkler has made several unsuccessful post-conviction motions (including a motion for collateral relief under 28 U.S.C. § 2255, which was denied as untimely). *See United States v. Trenkler*, 268 F.3d 16 (1st Cir. 2001). In October 2002, Trenkler filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, on the ground that the Supreme Court's decision in *Jones v. United States* decriminalized the conduct for which he was convicted and sentenced. In an order dated March 7, 2003, the District Court denied this petition for lack of jurisdiction. We consider Trenkler's appeal from this decision pursuant to our jurisdiction under 28 U.S.C. § 1291.[1]

II.

AEDPA Framework

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal prisoner may collaterally attack his or her sentence as unconstitutional or otherwise flawed by filing a petition under 28 U.S.C. § 2255. A prisoner may not, however, file a second or successive petition unless the court of appeals first certifies that it contains either (1) newly discovered evidence sufficient to establish by clear or convincing evidence that no

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[1] In federal habeas proceedings, we review the district court's legal conclusions *de novo* and apply a clearly erroneous standard to its factual findings. *Rios v. Wiley*, 201 F.3d 257, 262 (3d Cir. 2000).

reasonable factfinder would find the petitioner guilty of the offense, or (2) a new rule of constitutional law, made retroactive to cases on collateral review, that was previously unavailable. 28 U.S.C. § 2255. But under § 2255's so-called "savings clause," a prisoner may attempt to bypass the gatekeeping provisions that otherwise preclude successive § 2255 petitions. The savings clause allows a petitioner to seek a writ of habeas corpus under 28 U.S.C. § 2241 when a § 2255 motion would be "inadequate or ineffective to test the legality of his detention." *Id.*

Trenkler concedes that the arguments contained in his current petition do not qualify for successive petition certification under § 2255 because they do not involve new evidence or a new rule of constitutional law. Thus he may raise these arguments only in a habeas petition under § 2241. But to do this, he must first establish that § 2255 is "inadequate and ineffective to test the legality of his detention."

Mere inability to satisfy § 2255's gatekeeping requirements for successive petitions does not establish that § 2255 is inadequate and ineffective. *In Re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1977). A § 2255 petition is inadequate and ineffective "only if it can be shown that some limitation of scope or procedure would prevent a Section 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention." *United States v. Brooks*, 230 F.3d 643, 648 (3d Cir. 2000). We recognized in *Dorsainvil*, however, that "a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate" exemplifies the "uncommon situation" in which the § 2255 is inadequate and ineffective and in which a § 2241 petition is cognizable. *Dorsainvil*, 119 F.3d at 251. Put another way, § 2255 is inadequate and ineffective to test the legality of a conviction when: "(1) at the time of conviction, settled law of this circuit or the

Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law." *In re Jones*, 226 F.3d 328, 333-334 (4th Cir. 2000).

III.
Analysis of "Intervening Change in Substantive Law"

A. *Jones* does not negate Trenkler's conviction under 18 U.S.C. § 844(i).

Trenkler argues that *Jones v. United States* is an intervening change in substantive law that negates his conviction under 18 U.S.C. § 844(i). Section 844(i) criminalizes the malicious destruction (or attempted destruction) of a building or vehicle "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" by means of an explosive or fire. Trenkler argues that *Jones* heightened the statute's interstate commerce requirements thereby removing the conduct for which he was convicted from federal jurisdiction.

Subsequent to Trenkler's direct appeal to the First Circuit, the Supreme Court decided *Jones*, and held that the federal arson statute did not apply to the burning of a private residence that was not "used in . . . any activity affecting interstate . . . commerce," as § 844(i) requires. *Id.* at 859. There the state argued that the homeowner "used" the residence in an activity affecting interstate commerce by (1) pledging it as collateral to obtain a mortgage from an out-of-state lender, (2) obtaining a casualty insurance policy from an out-of-state insurer; and (3) receiving natural gas

from sources outside the state. *Id.* at 855. The Court held that these "passive, passing, or past connections to commerce" did not satisfy the statute's requirement that the house be "used"—*i.e.*, "actively employ[ed]"—in commercial activity. *Id.* at 855, 856.

Thus, the only issue the Supreme Court addressed in *Jones* was whether the building was "used" commercially. Deciding that it was not, the Court did not need to decide, nor did it suggest, whether the building's commercial function sufficiently affected interstate commerce—a distinct second step in the jurisdictional inquiry under § 844(i). *Id.* at 854 ("The proper inquiry, we agree, 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.'" (*cited United States v. Ryan*, 9 F.3d 660, 675 (8th Cir. 1993) (R. Arnold, J., concurring in part and dissenting in part))). *Jones* did not address—let alone change the law regarding—the degree to which a building's (or vehicle's) function must affect interstate commerce. *See United States v. Williams*, 299 F.3d 250, 258 (3d Cir.), *cert. denied*, 537 U.S. 1065 (2002) (rejecting that *Jones* requires trial courts to instruct juries that a substantial connection to interstate commerce is required); *United States v. Grassie*, 237 F.3d 1199, 1208 (10th Cir. 2002) ("The Court [in *Jones*] expressed no view on the '*de minimis*' standard for effects on interstate commerce. Its focus was on the active use versus passive or passing relationship to commerce. The Court required only "active employment" which affects commerce, not a particular quantum of effect.")

In this case, as the District Court found, there is uncontroverted evidence that Shay Sr. actively used the Buick for commercial activity, his part-time auto body repair business. Shay, Sr. drove the Buick to auto body parts stores to purchase parts manufactured for foreign and domestic cars. He drove it to the offices of insurance companies which whom he had dealings. Sometimes, and as recently as two

weeks before the bombing, he loaned it to customers while he repaired their cars. Shay Sr. thus "actively employed" the Buick in commercial activity, and thus it had more than a "passive, passing, or past connection" to commerce. So read, *Jones* does not negate Trenkler's conviction under § 844(i).

This conclusion does not contradict our decision in *United State v. McGuire*, 178 F.3d 203 (3d Cir. 1999). There we held that, in light of the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), local commerce with merely an "inconsequential" or "*de minimis*" effect on interstate commerce could not satisfy the jurisdictional nexus of 18 U.S.C. § 844(i). Otherwise, we cautioned, federal jurisdiction "could be stretched to include driving one's daughter to a neighbor's house to deliver a single box of Girl Scout cookies." 178 F.3d at 210. In *McGuire*, a pipe bomb exploded inside a vehicle that was sometimes used in connection with a local catering firm. We rejected the state's argument that the presence of a bottle of Florida orange juice in the vehicle's truck—the only evidence presented to support federal jurisdiction—was a sufficient nexus to interstate commerce for the purposes of § 844(i). In contrast, the evidence of Shay Sr.'s auto repair business's effect on interstate commerce was more than a bottle of orange juice or a single box of Girl Scout cookies. Shay Sr. serviced customers from out of state and he worked on both foreign and domestic cars. This is more than a *de minimis* affect on interstate commerce.

B. *Jones* does not negate Trenkler's conviction under § 844(d).

Trenkler also argues that *Jones* is an intervening change in substantive law that negates his conviction under 18 U.S.C. § 844(d). Under that subsection, it is a crime to "transport or receive, or attempt to

transport or receive, in interstate or foreign commerce, any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully damage or destroy any building, vehicle, or other real or personal property." Although *Jones* does not directly address § 844(d), Trenkler argues that "the broader holding of Jones is that *de minimis* links to interstate commerce are no longer sufficient to establish federal jurisdiction over traditionally local concerns." Br. at 35.

As explained above, *Jones* did not so hold. It considered whether a building (or by implication, a vehicle) was actively "used in" commercial activity, not whether that activity sufficiently affected interstate commerce. See *Williams*, 299 F.3d at 258; *Grassie*, 237 F.3d at 1208. Because the jurisdictional element of § 844(d) does not require that a building or vehicle be used in activity affecting interstate commerce, *Jones* is not an intervening change in substantive law that undermines Trenkler's conviction under § 844(d).

IV.
Conclusion

Jones does not decriminalize the conduct for which Trenkler was convicted. Thus the District Court properly held that there was not an intervening change in substantive law that entitled Trenkler to rely on the savings clause provision of 28 U.S.C. § 2255 to challenge the validity of his conviction pursuant to a petition under 28 U.S.C. § 2241. We therefore affirm the District Court's order denying Trenkler's habeas petition.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1775

ALFRED W. TRENKLER,

Appellant

v.

MICHAEL PUGH, Warden

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 02-cv-01736)
District Judge: Honorable Richard P. Conaboy

Submitted Under Third Circuit LAR 34.1(a)
December 12, 2003

Before: AMBRO, FUENTES and GARTH, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on December 12, 2003.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 7, 2003, is hereby

affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/
Chief Deputy Clerk

Dated: December 18, 2003

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1775

ALFRED W. TRENKLER,

Appellant

v.

MICHAEL PUGH, Warden

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 02-cv-01736)
District Judge: Honorable Richard P. Conaboy

Submitted Under Third Circuit LAR 34.1(a)
December 12, 2003

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER and GARTH*, Circuit Judges,

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SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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* Senior Judge Garth, who sat on the original panel is limited to panel rehearing only.

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: February 13, 2004

lwc/cc: Catherine J. Hinton, Esq.
James L. Sultan, Esq.
Kevin P. McGrath, Esq.
Kate L. Mershimer, Esq.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALFRED W. TRENKLER	:	
	:	CIVIL ACTION NO.
Petitioner,	:	3:02-CV-1736
	:	
vs.	:	
	:	(JUDGE CONABOY)
MICHAEL PUGH, Warden,	:	
USP-Allendwood,	:	
	:	
Respondent.	:	

MEMORANDUM and ORDER

I

Before the Court is Alfred W. Trenkler's ("Trenkler" or "Petitioner") Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2241 (Doc. 1). Petitioner is an inmate presently confined at the United States Penitentiary Allenwood (USP-Allenwood) in White Deer, Pennsylvania. Named as Respondent is Michael Pugh, the Warden of USP-Allenwood. Petitioner challenges the sentence imposed on him after a trial before the United States District Court for the District of Massachusetts. Specifically, Trenkler contends that, in light of the Supreme Court's decision in United States v. Jones, 529 U.S. 848, 120 S.Ct. 1904 (2000), the conduct for which he was convicted under 18 U.S.C. §§ 844(i), 844(d) and 371 is no longer criminal, thus making his continued detention unlawful. The Court has been fully briefed and the matter is ripe for disposition. For the reasons set forth below, the Petition is **DISMISSED**.

BACKGROUND

II

On June 24, 1993, a federal grand jury sitting in the District of Massachusetts returned a superseding indictment against Trenkler and another individual, Thomas A. Shay, Jr., ("Shay Jr."), for their respective roles in the explosion that took place on October 28, 1991, at the home of Thomas Shay, Sr., ("Shay Sr."), in Roslindale, Massachusetts. The explosion killed Boston Police Bomb Squad Officer Jeremiah Hurley and severely maimed Bomb Square Officer Francis Farley. The indictment charged Trenkler and Shay Jr. with conspiracy in violation of 18 U.S.C. § 371 (Count I); receipt of explosive materials in interstate commerce with knowledge and intent that the explosive materials would be used to kill, injure and intimidate Shay Sr. and cause damage and destruction to his real and personal property in violation of 18 U.S.C. § 844(d) (Count 2); and with knowingly attempting to maliciously damage and destroy, by means for fire and explosive a car owned by Shay Sr. that was used in interstate commerce and in activities affecting interstate commerce, in violation of 18 U.S.C. § 844(i) (Count 3).[1] (Docs. 2, 14).

After a seventeen day trial before the Honorably Rya W. Zobel, the jury convicted Trenkler on all three counts of the superseding indictment. (Id.). Trenkler's post-verdict motions were denied and he was sentenced to concurrent terms of life imprisonment on Counts 2 and 3 and sixty (60) months imprisonment on Count 1.[2] (Doc. 14, at 6).

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[1] On Trenkler's motion, the district court severed the case and tried the two defendants separately. (Doc. 2).

[2] Review of the record here makes the Court award of the stark difference between the life sentence imposed on the Petitioner and the 12 year sentence imposed on his co-conspirator following a plea agreement in the latter instance. Such perceived disparity

Trenkler filed a timely appeal. (Doc. 2, at 3). The conviction was affirmed on direct appeal.[3]

On December 22, 1995, Petitioner filed a motion, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial, or in the alternative, for an evidentiary hearing on the grounds of newly discovered evidence. This motion was denied without a hearing on February 4, 1997. (Doc. 2, at 4).

On November 19, 1996, Trenkler filed a motion for judicial inquiry into possible juror misconduct and for a new trial based on an allegation of juror misconduct. The District Court denied the motion on May 22, 1997. (Id.) The First Circuit affirmed the district court's denial of both motions for a new trial.[4] (Id.)

On January 5, 1999, Trenkler filed a motion pursuant to 28 U.S.C. § 2255, in which he alleged ineffective assistance of trial counsel for failing to introduce certain expert testimony. (Id. at 5). The district court denied the petition as time-barred. The First Circuit affirmed the district court's denial of the § 2255 petition.[5]

On August 10, 2000, Trenkler filed a motion, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial, or in the alternative, for an evidentiary hearing, on the grounds of new discovered evidence. On December 28, 2000, the district court denied the motion as untimely. On April 6, 2001, the First Circuit dismissed Trenkler's appeal from the district court's denial of the motion. (Doc. 2, at 10). Trenkler's petition for writ of certiorari was denied on October 9, 2001.[6]

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may be what impels the Petitioner to repeated litigation. Other than the obvious human emotional response, this should not and did not play any role in the Court's disposition of this case.

[3] See United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995).

[4] See United States v. Trenkler, 134 F.3d 361 (1st Cir. 1998).

[5] See United States v. Trenkler, 268 F.3d 16 (1st Cir. 2001).

[6] See United States v. Trenkler, 534 U.S. 950 (2001).

Trenkler filed the instant Petition for Writ of Habeas Corpus pursuant to § 2241 and Memorandum of Law in Support of the Petition on September 27, 2002. (Docs. 1-2). The Government filed its Memorandum of Law in Opposition to Trenkler's Petition on January 13, 2003. (Doc. 14). On February 11, 2003, Trenkler filed a Reply in Support of his Petition. (Doc. 17).

DISCUSSION

III

The parties submitted unnecessarily lengthy briefs, but their positions can be succinctly stated as follows. The Petitioner asserts that he is being held in custody unlawfully for conduct that is no longer criminal. He bases this assertion on the Supreme Court's decision in Jones, supra, which was decided subsequent to Trenkler's conviction, appeal and first § 2255 motion. (Doc. 1, at 3). He contends that Jones "significantly heightened" the requirements for proving the interstate commerce elements of §§ 844(i) and 844(d), and as a result, the evidence proved at trial regarding the nexus between the 1986 Buick Century ("the Buick") used in Shay Sr.'s auto body repair business and interstate commerce is no longer sufficient to support his conviction. (Doc. 2, at 1). While he recognizes that he cannot satisfy the gatekeeping provision of § 2255 (such that he would be able to file a second or successive motion under § 2255), he nevertheless contends that he may seek relief pursuant to the savings clause of § 2255. (Doc. 1, at 6). In so arguing, he relies on a narrow exception to the general rule that challenges to a federal court conviction must be pursued in the sentencing court under § 2255. Trenkler maintains that this narrow exception, as set forth in In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997), permits him to file a petition for

writ of habeas corpus pursuant to § 2241 in order to have this Court review his claims.

The Government argues that Trenkler's Petition should be dismissed on several grounds. First, the Government asserts as baseless Trenkler's claim that Jones requires his conviction under § 844(d) to be overturned because Jones does not address the scope or constitutionality of that statute, but rather interprets only § 844(i). (Doc. 14, at 2-4). On this basis, the Government contends that since Trenkler's conviction under § 844(d) is unaffected by Jones, and since Trenkler failed to cite any cases that extended the holding of Jones to § 844(d), his claim with respect to his conviction under § 844(d) is both "substantively meritless and jurisdictionally defective." (Id.) Second, the Government maintains that Jones is distinguishable from Trenkler's case. The Government compared the residential home not used for any commercial purpose in Jones with the Buick used in connection with Shay Sr.'s auto body repair business in this case. (Id. at 4). The Government then argued that Jones is not relevant to the matter before the Court since Jones "did not hold, or even remotely suggest, that 844(i) does not cover arson or property actually used explicitly state or even suggest that such use must be more than de minimis." (Id. at 4). Third, the Government avers that Trenkler is barred from raising his claims pursuant to a § 2241 petition since he does not qualify for relief under the "savings clause" of 28 U.S.C. § 2255. (Id.).

IV

In 1996, Congress imposed new limitations on the availability of collateral attack of convictions and sentences by amending 18 U.S.C. § 2255 through the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). A § 2255 motion filed with the sentencing court is "[t]he usual

avenue for federal prisoners seeking to challenge the legality of their confinement." Dorsainvil, 119 F.3d at 249. In general, a § 2255 motion "supersedes habeas corpus and provides the exclusive remedy" to one in custody pursuant to a federal court conviction. Strollo v. Alldredge, 463 F.2d 1994, 1995 (3d Cir.), cert. denied, 409 U.S. 1046, 93 S.Ct. 546 (1972). Under the AEDPA, a prisoner may file a second or successive § 2255 motion only if the court of appeals first certifies that the petition is based on either:

> (1) new discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[7]

Dorsainvile, 119 F.3d at 247.

Federal prisoners may attempt to circumvent the gatekeeping provisions of § 2255 by bringing a claim for collateral review of a conviction or sentence under § 2241. A § 2241 petition is only available to attack the validity of a conviction or sentence if the prisoner can show that a § 2255 motion is "inadequate or

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[7] Several courts have held that Jones is a new rule of statutory interpretation of 18 U.S.C. § 844(i), and not a new rule of constitutional law. See, e.g., United States v. Prevatte, 300 F.3d 792, 798 (7th Cir. 2002) (cites omitted) ("the Supreme Court [in Jones] parsed and determined the meaning of the statutory language in § 844(i); it did not need to address the issue of constitutionality. . . ."); United States v. Ryan, 227 F.3d 1062 (8th Cir. 2000) (holding that Jones established the substantive reach of a federal statute).

ineffective to test the legality of . . . detention."[8] This petition is brought in the district court with jurisdiction over the petitioner's custodian.[9] See United States v. Ferri, 686 F.2d 147, 158 (3d Cir. 1982) (citing Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 93 S.Ct. 1123 (1973)). "Section 2241 'is not an additional, alternative or supplemental remedy to 28 U.S.C. § 2255.'" Myers v. Booker, 232 F.3d 902, 2000 WL 1595967, at *1 (10th Cir. 2000) (citing Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996)).

The petitioner has the burden to prove that the remedy afforded by § 2255 is "inadequate or ineffective." See Lewis v. Romine, 2001 WL 1555273, *3 (M.D. Pa. 2001). A petition under § 2255 does not become "inadequate or ineffective" merely because the petitioner cannot meet the AEDPA requirements. See Dorsainvil, 119 F.3d at 251 ("We do not suggest that

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[8] This is known as the "savings clause" of § 2255. The statute provides in part:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [section 2255], shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*

28 U.S.C. § 2255 (emphasis added).

[9] Section 2241 provides in part:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2241(a).

§ 2255 would be 'inadequate or ineffective' so as to enable a second petitioner to invoke § 2241 merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255. Such a holding would effectively eviscerate Congress' intent in amending § 2255."); see also Brown v. Mendez, 167 F. Supp. 2d 723, 726 (M.D. Pa. 2001) (Vanaskie, C.J.) (citing United States v. Barrett, 178 F.3d 34, 50 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000)). "It has long been the rule of this circuit that 'the remedy by motion [under § 2255] can be "inadequate or ineffective to test the legality of . . . detention" only if it can be shown that some limitation of scope or procedure would prevent a Section 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention.'" United States v. Brooks, 230 F.3d 643, 648 (3d Cir. 2000) (citing United States ex rel. Leguillou v. Davis, 212 F.2d 681, 684 (3d Cir. 1954)); see also Application of Galante, 437 F.2d 1164, 1165 (3d Cir. 1971) (per curiam) (same). "It is the inefficiency of the remedy, not a personal inability to utilize it, that is determinative . . . ."Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986).

V

In this case, Trenkler argues that his claim falls within the narrow exception to the general prohibition against filing § 2241 petitions to challenge a federal conviction, as recognized by the Court of Appeals for the Third Circuit in Dorsainvil, supra. In that case, the petitioner argued that the Supreme Court's decision in Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501 (1995), which was issued after the petitioner's first § 2255 motion was denied on the merits, rendered the activity for which he was

convicted no longer criminal.[10] The petitioner, with the hope of collaterally attacking his sentence in the district court, sought certification from the Third Circuit to file a second § 2255 petition. Since Bailey did not announce a new rule of constitutional law, but merely interpreted the applicable statute, Dorsainvil failed to meet § 2255's gatekeeping provisions. Accordingly, the Third Circuit denied certification. However, this did not end the court's review of the matter.

The Dorsainvil court held that a § 2255 motion was only "inadequate and ineffective" thereby allowing a petitioner to bring a § 2241 habeas corpus action) where the denial of the habeas action would raise serious constitutional issues. 119 F.3d at 249. The serious constitutional issue in Dorsainvil was that a change in substantive law since the petitioner's conviction had negated the criminal nature of the conduct for which the petitioner was convicted. Id. at 251. Also at issue was the retroactive application of the Supreme Court's statutory construction of the elements of a crime. Fundamental to this approach was the fact that a petitioner could claim that he was actually innocent of the crime for which he was convicted. "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 624, 118 S.Ct. 1604 (1998). In this case, Trenkler failed to present any evidence that he was actually innocent of the crimes for which he was convicted.

The Third Circuit was careful to note that this very narrow holding is limited to petitions involving conduct that has "been rendered non-criminal by an intervening Supreme Court decision," which the

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[10] Bailey involved a review of 18 U.S.C. § 924(c)(1), which punishes anyone who uses or carries a firearm while involved in a drug trafficking crime. The Supreme Court narrowly interpreted § 924(c)(1) to require active use of the firearm.

petitioner could not have presented on his first § 2255 motion. Dorsainvil, 119 F.3 at 252. That kind of situation, according to the court, "results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under § 2255." Id. at 250 (citing Davis v. United States, 417 U.S. 333, 346-47 (1974)). Thus, Dorsainvil set a high bar for what a court will consider a serious constitutional issue sufficient to allow a petitioner to bring a § 2241 petition to challenge a conviction or sentence.

VI

Trenkler contends that in light of the Supreme Court's decision in Jones, his case falls within these narrow parameters, thus permitting this Court to review the substance of his petition. In Jones, the Court addressed the scope of the federal arson statute codified in 18 U.S.C. § 844(i).[11] Jones was indicted and convicted under the federal arson statute for "toss[ing] a Molotov cocktail through a window into a home in Fort Wayne, Indiana, owned and occupied by his cousin." 529 U.S. at 851. The Seventh Circuit affirmed the conviction. The Supreme Court granted certiorari in part to address a narrow issue.[12] See

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[11] Section 844(i) provides in part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used *in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both. . . ."

18 U.S.C. § 844(i) (emphasis added).

[12] The Supreme Court previously construed § 844(i) in Russel v. United States, 471 U.S. 858, 105 S.Ct. 2455 (1985), where it

Jones v. United States, 528 U.S. 1002, 120 S.Ct. 494 (1999). The Court framed the issue as follows: "Does § 844(i) cover property occupied and used by its owner not for any commercial venture, but as a private residence. Is such a dwelling place, in the words of § 844(i), 'used in . . . any activity affecting . . . commerce'?" Jones, 529 U.S. at 854.

In Jones, the Government argued that the following connections to interstate commerce were sufficient under the statute: (1) the dwelling was used to obtain a mortgage from an out-of-state lender; (2) the dwelling was used to obtain casualty insurance from an out-of-state insurer; (3) the dwelling received natural gas from out-of-state supply sources. 529 U.S. at 855. The Supreme Court rejected the Government's argument. The Court, focusing its analysis on the term "use" in commerce, found that the dwelling was used solely as a residence for Jones and his family and not for any "trade or commercial purpose." Id. at 856. The Court then concluded that "[i]t surely is not the common perception that a private, owner-occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy." Id.

The Court determined that a building is "used" in an activity affecting interstate commerce only when, at the time of the arson, it is being "active[ly] employ[ed] for commercial purposes," thereby requiring more than "merely a passive, passing, or past connection to commerce." Id. at 858. The Court reversed the conviction and held that "an owner-occupied residence *not used for any commercial purpose* does not qualify

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held that an apartment building that was being rented at the time the owner attempted to have it destroyed by fire, was being used in an activity affecting commerce within the meaning of § 844(i). The Court stated: "the legislative history [of § 844(i)] suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." Id. at 862.

as property 'used in' commerce or commerce-affecting activity; arson of such a dwelling, therefore, is not subject to prosecution under § 844(i)."[13] Id. at 851-52 (emphasis added). The Court narrowly construed the scope of § 844(i) and avoided and constitutional issues involving United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624 (1995).

We find that the evidence in this case presents a substantially different set of facts than those in Jones and that stark difference compels a different result than in Jones. Justice Ginsburg, delivering the opinion for a unanimous Court, reiterated several times that the issue was whether § 844(i) covered property occupied and used as a private residence, with no active connection to any commercial activities. Jones indicates that minimal, passive connections to non-commercial activities do not satisfy the jurisdictional elements of § 844(i). Thus it is clear that Jones is a limited holding that does not affect the disposition of Trenkler's conviction and sentence.

Unlike the situation with Bailey in Dorsainvil, Jones did not decriminalize the conduct at issue in this case. The obvious distinction is that Jones involved a private residence that served no commercial purpose.[14] By contrast, in this case, there is uncontradicted evidence that the Buick was used in Shay Sr.'s auto body repair business at the time of the bombing. For example, during the course of his work, Shay Sr. drove the Buick to auto body part stores to purchase parts that were manufactured for foreign

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[13] Section 844(i)'s "affecting interstate commerce" provision is a jurisdictional element of the crime which must be proved by the Government beyond a reasonable doubt. See also United States v. Williams, 299 F.3d 250, 253-54 (3d Cir., cert. denied, ___ U.S. ___ 123 S.Ct. 614 (2002); United States v. Gaydos, 108 F.3d 505, 508 (3d Cir. 1997).

[14] The Court suggested that its analysis would have been different had the residence "served as a home office or the locus of any commercial undertaking." Jones, 529 U.S. at 849.

and domestic cars. He also drove the car to the offices of insurance companies with which he had dealings. His customers were from the Boston area as well as from out of state. Additionally, there is uncontroverted testimony that Shay Sr. loaned the Buick to customers for unrestricted use while he repaired the customers' cars.[15] (Docs. 2, 3, 14). These examples show more than merely passive use of the property; rather, it is clear that the Buick was actively employed in Shay S..'s business. Certainly, these actions show the car was "used in interstate or foreign commerce." This is a far different scenario than in Jones, where the homeowner "did not use his residence in any trade or business." Jones, 529 U.S. at 856.

VII

Within this framework, we also find Trenkler's claim that Jones renders his conviction for the receipt of explosive materials under § 844(i) unlawful without

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[15] Of course that does not mean that Jones could not be applied to vehicles. Indeed, the Jones functional analysis has been used by other Circuits in cases involving automobiles or trucks. See, e.g., United States v. Cristobal, 293 f.3d 134 (4th Cir. 2002) (concluding that: (1) trucks were owned by commercial businesses, (2) businesses were responsible for insurance on the trucks, (3) the primary purpose of trucks was to transport their drivers to and from work); United States v. Geiger, 263 F.3d 1034 (9th Cir. 2001) (holding that evidence was sufficient to establish nexus between victim's leased truck and interstate commerce); United States v. Grassie, 237 F.3d 1199 (10th Cir. 2001) (finding sufficient evidence of a connection to interstate commerce where truck was used seasonally to transport employer's pecans for sale). However, it is important to highlight that the procedure posture of the Cristobal, Geiger and Grassie opinions differ significantly from this case. In those cases, the Fourth, Ninth and Tenth Circuits affirmed or appeal convictions under § 844(i). None of the courts addressed the situation before this Court, namely, the effect of Jones on a § 2241 petition where the facts at issue are substantially different from those presented in Jones. We are not persuaded that those cases affect the disposition of this case.

merit.[16] Despite his concession that "[t]he narrow holding of the Supreme Court in Jones regarding § 844(i) did not specifically mention § 844(d)," he asserts that the language of the latter statute should be interpreted in a manner consistent with the holding in Jones. (Doc. 2, at 34). The Government counters this by arguing:

> Jones did not address 844(d) whatsoever, nor can Jones be read to call into question the constitutionality of 844(d) or to graft onto it, as Trenkler argues, a requirement that the government need prove more than the shipment of an explosive device in interstate commerce to satisfy the interstate commerce requirement of 844(d).

(Doc. 14, at 35). We agree with Government's statement that Jones does not address § 844(d), but we shall refrain from addressing whether Jones affects the constitutionality of § 844(d). As discussed above, we find that Jones does not de-criminalize the conduct at issue in this case. As such, we do not have jurisdiction to reach the substance of this matter under § 2241.

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[16] Section 844(d) provides in part:

> Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title . . . .

28 U.S.C. § 844(d).

VIII

Although Petitioner's first § 2255 motion was unsuccessful and he may be procedurally barred from seeking relief by a second or subsequent § 2255 motion, precedent dictates that the facts of his case do not render a § 2255 motion "inadequate or ineffective." Since we have concluded that Trenkler's reliance on Jones is misplaced, he is unable to show that a change in the substantive law since his conviction has negated the criminal nature of the conduct for which he was sentenced. Thus, he fails to satisfy the "inadequate or ineffective" exception under § 2255. The court in Dorsainvil stated that "habeas corpus under § 2241 is now reserved for rare cases." 119 F.3d at 250. Moreover, we are sensitive to the fact that the court stressed that nothing in its holding "represented a deviation from [the Third Circuit's] prior precedent strictly construing the applicability of the safety-valve language in § 2255." Id. at 251 (cites omitted). Trenkler's claim of being detained for conduct that a subsequent Supreme Court decision has rendered not criminal is devoid of merit.[17] It

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[17] We recognize that several other courts have reviewed § 2241 petitions that rely on Jones for the argument that a subsequent decision by the Supreme Court rendered conduct for which the petitioner was convicted no longer criminal. See, e.g., Martin v. Perez, 2003 WL 297090 (6th Cir. Feb. 13, 2003) (holding that petitioner was entitled to review under § 2241 of a conviction for manufacturing and detonating a bomb which resulted in damaging a private residence); United States v. Prevatte, 300 F.3d 792 (7th Cir. 2002) (transferring the case to the district court with jurisdiction over petitioner's custodian for consideration of § 2241 petition to review a conviction involving a pipe bomb that damaged a private home and garage); Bennett v. Lamana, 2001 WL1299257 (6th Cir. 2001) (affirming dismissal of § 2241 petition requesting review of conviction for arson of rental property); Davis v. Ray, 2001 WL 1301342 (D. Kan. 2001) (finding that the Department of Housing and Urban Development and the Virginia Housing Development Authority had an interest in the private residential house, thus removing the case from the purview of Jones).

would not be a "complete miscarriage of justice" to deny relief in this case. Compare Dorsainvil, 119 F.3d at 251.

Accordingly, Trenkler's § 2241 petition is **DISMISSED**. An appropriate Order follows:

S/Richard P. Conaboy

Richard P. Conaboy
United States District Judge

DATE: March 7, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALFRED W. TRENKLER	:	
	:	CIVIL ACTION NO.
Petitioner,	:	3:02-CV-1736
vs.	:	
	:	(JUDGE CONABOY)
MICHAEL PUGH, Warden,	:	
USP-Allendwood,	:	
	:	
Respondent.	:	

ORDER

However, these are of little help since the factual histories of these cases are more closely analogous to the facts in Jones and do not present the circumstances at issue here. Furthermore, Petitioner failed to cite any cases where a court granted relief under § 2241 involving the facts at issue here that would persuade us to exercise jurisdiction over this case to resolve the substantive claims.

NOW, THIS 7th DAY OF MARCH, 2003, IT IS HEREBY ORDERED THAT:

1. The Petition for Writ of Habeas Corpus, (Doc. 1), is **DISMISSED.**

2. The Clerk of Court is directed to **CLOSE** this case.

S/Richard P. Conaboy

Richard P. Conaboy
United States District Judge